92-735

No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

IN THE MATTER OF THE ESTATE OF
MARIE ALMA GUMBRECK, DECEASED

JOHN A. BLASCHKE,

Petitioner,

versus

MARJORIE J. CAUSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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Attorney and Counsel of Record for the Petitioner

September, 1992

QUESTION PRESENTED

Under Tulsa Professional Collection Services, Inc. v. Pope and other Due Process jurisprudence, may an allegedly "disinherited heir" be denied mailed or other personal notice of the pendency of the estate's administration if that party is reasonably ascertainable?

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OPINIONS BELOW

The Opinions and Orders below were not officially published. The Oklahoma Court of Appeals, Division 2, issued its Opinion on December 24, 1991. This Opinion was published at 63 Okla. B.J. 49 (1992). The Oklahoma Supreme Court denied Petitioners Writ of Certiorari on June 11, 1992. This denial was published at 63 Okla. B.J. 1795 (1992). Mandate was issued in this case by the Oklahoma Supreme Court on June 17, 1992. Mandate was published at 63 Okla. B.J. 1859 (1992). See Appendix I.

JURISDICTIONAL GROUNDS

The Oklahoma Court of Appeals, Division 2, entered its decision on December 24, 1991. The Supreme Court of the State of Oklahoma entered its order denying discretionary review of said decision on June 11, 1992. This Court has jurisdiction to review the decision of the Oklahoma Court of Appeals, Division 2, and denial of review by the Oklahoma Supreme Court pursuant to 28 U.S.C. § 1257 (Supp. 1992).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. amend. XIV, § 1

2. Okla. Stat. Ann. tit. 58, O.S. § 25 (West Supp. 1992)

3. Okla. Stat. Ann. tit. 58, O.S. § 29 (West Supp. 1992)

4. Okla. Stat. Ann. tit. 58, O.S. § 61 (West Supp. 1992)

5. Okla. Stat. Ann. tit. 58, O.S. § 67 (West Supp. 1992)

See Appendix II.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN THE MATTER OF THE ESTATE OF
MARIE ALMA GUMBRECK, DECEASED

JOHN A. BLASCHKE,

Petitioner,

versus

MARJORIE J. CAUSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

John A. Blaschke, Petitioner, hereby petitions the Court to issue a Writ of Certiorari to review the judgment and opinion of the Oklahoma Court of Appeals, Division 2 and the denial of review of that opinion by the Oklahoma Supreme Court.

STATEMENT OF THE CASE

I. Preliminary Statement.

The Question Presented arises in the context of a dispute regarding the estate of Marie Alma Gumbreck ("decedent"). The decedent named the Petitioner, Dr. John A. Blaschke ("Blaschke"), the sole devisee, legatee and executor of her estate by a will ("the Original Will") executed in 1966 and re-published by codicil in 1976. On January 1, 1989, the decedent moved to Ponca City, Oklahoma, where she lived with the respondent, Marjorie J. Causey, and her husband, Edward L. Causey. Within two weeks of moving, the decedent requested her lawyer in Oklahoma City to draft a new will, naming the Causeys as the sole devisees and legatees of her estate. The decedent executed the new will ("the Causey Will") in Ponca City, Oklahoma on

January 17, 1989. Decedent died on September 1, 1989.

On October 4, 1989, Marjorie J. Causey filed a petition in the District Court of Kay County, Oklahoma, which requested the court to admit the Causey Will to probate. The court set a date, October 16, 1989, for a hearing on the petition and caused notice of such hearing to be mailed to Marjorie and Edward Causey only and published in the Ponca City News, pursuant to Okla. Stat. tit. 58, § 25. The publication notice, which was published on two dates, October 5 and 12, 1989, purported to give notice to "all persons interested in the estate . . .." The court appointed Marjorie J. Causey to be the Personal Representative of the estate and admitted the will to probate on October 16, 1989.

Blaschke received no notice of the hearing or of the admission of the Causey Will to probate.

On or about December 15, 1989, Blaschke asked his attorney to investigate the status of the decedent's estate. On or about December 22, 1989, Blaschke's attorney discovered that the court had admitted the Causey Will to probate. Blaschke and his counsel then conducted an investigation into whether the Original Will was revoked by execution of the Causey Will and whether Blaschke might have a cause of action to contest the Causey Will. From such investigation, Blaschke determined that the Causey Will was presumptively invalid on the grounds of undue influence and that the decedent's competence to execute a valid will was questionable.

II. Course of Proceedings

On February 5, 1990, Blaschke filed a sworn petition in the District Court of Kay County, State of Oklahoma, which contested the validity of the Causey Will. Thereafter, Respondent, Marjorie J. Causey, filed a Motion to Dismiss. Respondent alleged that Okla. Stat. tit. 58, §§ 61 and 67 barred Blaschke's claim. In relevant part, Section 61 states:

> When a will has been admitted to probate, any person interested therein may at any time within three (3) months from the date the will was admitted to probate contest the same or the validity of the will.

Section 67 states:

> If no person, within three (3) months after the admission to probate of a will, contests the same or the validity thereof, the probate of the will is conclusive, saving to infants and persons of unsound

> mind, a period of one (1) year after their respective disabilities are removed.

In his Brief in Response to the Motion to Dismiss, Blaschke argued that "Due process requires that adversary parties will be given proper notice and an opportunity to be heard before any of their liberty or property interests are altered or affected." The trial court, by Minute Order dated March 26, 1990, rejected Blaschke's argument, stating that the "Petition of John A. Blaschke is denied." Additionally, the court stated:

> The Petitioner knew of the Petition to admit the will to Probate and had time to file a Petition to contest the admission of the will to probate within the three month statutory period of time allowed by the statutes of the State of Oklahoma.[1]

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[1] See Appendix I.

On April 24, 1990, Blaschke timely filed a Petition in Error, thereby appealing the trial court's decision to the Oklahoma Supreme Court. The Oklahoma Supreme Court assigned the case to the Oklahoma Court of Appeals, Division 2.

Blaschke, in his Petition in Error and in his Brief in Chief, maintained that his failure to receive notice violated the Due Process Clause of the Fourteenth Amendment. The Court of Appeals held that Blaschke was not entitled to statutory notice under Okla. Stat. tit. 58, § 25, which states:

> When the petition for probate of a will is filed the court must fix a day for hearing said petition, not less than ten (10) nor more than thirty (30) days from the filing of the petition, and if the names and addresses of all heirs, legatees, and devisees of the testator are known to the petitioner and are set out in said petition, the court shall cause notice of such hearing to be given as provided in Title 58,

> O.S. Annot., Sec. 34; Laws 1969, c. 302, § 38, by mailing copies of such notice to all heirs, legatees, and devisees, postage prepaid, at their last-known place of residence not less than ten (10) days prior to the date of said hearing; provided, however, if the name or address of one or more heirs, legatees, and devisees of the testator is not known to the petitioner, notice of the hearing of said petition shall be given by mailing, as above provided, and, in addition thereto, said notice shall be published in one issue of a newspaper, and in such case said hearing shall not be less than ten (10) days from the date of publication of such notice.

The Court of Appeals ruled that, despite being a "person interested" in the estate, a "disinherited" heir, legatee or devisee is not an heir, legatee or devisee and, thus, is not entitled to statutory notice. The court held that "[T]he notice given according to statute in this proceeding was reasonable and adequate." Additionally, the court placed considerable importance on "Blaschke's own

admission" that "he had actual notice that the will was admitted to probate as early as December 15, 1989." The court stated that "as a general rule, one having actual notice is not prejudiced by, and may not complain of failure to receive statutory notice."[2]

Blaschke timely filed a Petition for Writ of Certiorari in the Supreme Court of the State of Oklahoma on January 13, 1992, again raising the lack of proper notice as a constitutional violation. This Writ was denied on June 11, 1992.[3]

Due to the course the proceedings below have taken, Blaschke has never been able to show that his claim was known or reasonably ascertainable. However, Blaschke contends now, as he did below,

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[2] See Appendix I.

[3] Id.

that his claim was clearly known or at least reasonably ascertainable.

REASONS FOR GRANTING THE WRIT

The lower courts decided a question of constitutional substance not in keeping with the Due Process decisions of this Court, which affects the rights of not only Petitioner and other similarly situated Oklahoma citizens, but which could affect the rights of citizens of several other states.

This Court should issue a Writ of Certiorari in this case because the lower court has decided an important question of federal law which has not been, but should be, decided by this Court. Additionally, the lower court's decision runs counter to the principles enunciated by this Court regarding the notice requirements of the Fourteenth Amendment's Due Process Clause.

In Mullane v. Central Hanover Bank & Trust,[4] the Supreme Court established the standards by which notice provisions are judged. Mullane involved the constitutional sufficiency of notice to beneficiaries of a common trust fund in regard to a judicial settlement of accounts, which effectively settled all questions respecting the management of the common fund. New York banking law only required publication notice in a local newspaper. The beneficiaries' guardian challenged this notice provision for depriving beneficiaries of their due process rights. The Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and

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[4]339 U.S. 306 (1950).

> afford them an opportunity to present their objection.[5]

However, the Court did not commit itself to a specific requirement for adequate notice. Instead, the Court set forth a balancing test for determining the constitutionally required form of notice. The Court balanced the state's interest in giving only publication notice against the individual's interest sought to be protected by the Fourteenth Amendment. The Court specifically held publication notice to be insufficient, because the beneficiaries involved were known to the bank and, therefore, could easily have been notified in a manner more likely to give actual notice. The Court specifically held that publication notice to known or reasonably ascertainable

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[5]339 U.S. at 314.

parties did not satisfy due process.[6] Additionally, the Court established that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.[7]

Recently, in Mennonite Board of Missions v. Adams,[8] the Court reaffirmed the holding of Mullane. In Mennonite, the Court stated:

> [N]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.[9]

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[6] 339 U.S. at 320.

[7] See also Logan v. Zimmerman Brush Co., 455 U.S. 420, 428 (1982).

[8] 462 U.S. 791 (1983).

[9] 462 U.S. at 800.

Significantly, the Court applied the principles set forth in Mullane to probate proceedings in Tulsa Professional Collection Services, Inc. v. Pope[10]. Pope involved the nonclaim provision of Oklahoma's probate code, under which a creditor's claims against an estate are barred unless they are presented to the executor or executrix within two months of the publication of notice advising creditors of the commencement of probate proceedings[11]. At issue was whether notice solely by publication satisfied the Due Process Clause. The Court first determined that the nonclaim statute was not a self-executing statute of limitations. Also, the Court found that the states intimate involvement with the

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[10]485 U.S. 478 (1988).

[11]Okla. Stat. tit. 58, § 333 (1981).

proceedings, particularly with respect to triggering the running of the time bar, was so pervasive that it must be considered state action subject to the Due Process Clause.[12] The Court, after applying the Mullane balancing test, held that if appellants identity as a creditor was known or reasonably ascertainable, the Due Process Clause required that appellant be given "notice by mail or other means as certain to ensure actual notice."[13]

Additionally, in Coe v. Armour Fertilizer Works, the Supreme Court held that actual notice, where it is provided by extra-official or casual notice, cannot be deemed a substantial substitute for the due process of law that the Constitution

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[12]485 U.S. at 487.

[13]485 U.S. at 491.

requires.[14] Likewise, in Wuchter v. Pizzutti, the Court ruled that where a person has actual notice not directed by the statute, the actual notice cannot supply constitutional validity to the statute.[15] Thus, a litigant is not deprived of his ability to challenge a statutory notice provision simply because he may have received extra-official or casual notice not prescribed by the statute. Bolstering this authority is the Court's statement in Mennonite that "a party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligation."[16] In the instant case, the lower court struggled with this principle, as have

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[14]237 U.S. 413, 424-425 (1915).

[15]276 U.S. 13, 24 (1928).

[16]462 U.S. at 799.

other courts. In Wiren v. Eide,[17] the court held that a party's receipt of actual notice deprived him of standing to challenge a statutory notice provision. The court in Wiren struggled to distinguish Wuchter and Coe. Other state courts have followed Wuchter and Coe. In Watkins v. Dodson, the court stated that "[A]ctual knowledge. . .cannot operate as a substitute required by due process of law. The law must require notice and give a right and an opportunity to be heard."[18]

The decision rendered by the lower court runs counter to every principle of due process enunciated above. The lower court opined that the fact that a "disinherited" heir, legatee or devisee is

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[17]542 F.2d 757, 762 (9th Cir. 1976).

[18]68 N.W. 2d 508, 513 (Neb. 1955).

an interested party does not necessarily entitle him to statutory notice. The court ruled that, although heirs, legatees and devisees are entitled to statutory notice, "disinherited" heirs, legatees and devisees are entitled to no notice before their causes of action are extinguished by the time bar. Remarkably, the court distinguished Pope on the grounds that estate creditors were expressly entitled to notice by statute, whereas "disinherited" heirs, legatees and devisees are not entitled to notice by statute. The court failed to recognize that, because minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for

determining the preconditions to adverse official action.[19]

Not only did the lower court decision conflict with the principles of Pope in holding that Blaschke was not entitled to any notice under Oklahoma statutes, it also erred in holding that Blaschke's alleged "actual notice" cured any constitutional defect.

First, Blaschke has not been allowed any opportunity to develop facts in his favor. The court stated that "Blaschke was on actual notice and had plenty of time to file a will contest." Because the court decided this case on a motion to dismiss, Blaschke never received any evidentiary hearings to contest these facts.

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[19]455 U.S. at 432.

Second, it is undisputed Blaschke had no notice of the initial hearing on the admission of the Causey Will to probate. The critical date upon which the state involved itself in the probate process and the date upon which the time bar for contesting the admission of the will begins to run is the date of the court's admission of the will to probate. Blaschke learned of the admission of the Causey Will to probate, by his own investigation, some two months after its admission. This Court has always held that casual or unofficial notice does not satisfy the requirements of due process.[20] If state action is involved in extinguishing property rights, state

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[20] Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Wuchter v. Pizzutti, 276 U.S. 13 (1928).

sanctioned notice consistent with this Court's due process holdings is required.

Blaschke's cause of action to contest the Causey Will is a species of property protected by due process. The will contest time bar in Oklahoma is triggered by the court's admission of the will to probate. There can then be no question that the Oklahoma court's direct involvement with these non-claim will contest statutes is identical to the situation and the state action described in Pope.

For these reasons, the Court should issue a Writ of Certiorari and ultimately decide whether reasonably ascertainable "interested persons" like Blaschke must be accorded notice reasonably calculated to apprise them of state action which may alter or destroy protected property

interests, regardless of whether their own efforts stumble across those actions of the state.

Further, the lower court decided an important question of federal law. Nearly forty years passed before Mullane's due process principles were extended to probate proceedings. Now, the Oklahoma courts have again expressed their reluctance to observe the requirements of due process in the probate setting. However, this issue is not limited to the Oklahoma statutory probate scheme. The Missouri Supreme Court, in a case similar on its facts to the instant case, likewise held that due process does not require that actual official notice of the admission of a will to probate be given to an heir, and, consequently, that an heir's will contest may be barred by the

limitations period without the heir having received official notice.[21] Moreover, at least Alabama,[22] Illinois,[23] Missouri,[24] Nevada,[25] South Dakota[26] and Washington[27] have statutory schemes regarding will contest time bars and notice provisions that are similar to Oklahoma's. The Court should grant the Writ to answer and address this question of national substance.

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[21]Cool v. Reed, 717 S.W. 2d 518 (Mo. 1986).

[22]Ala. Code §§ 43-8-199 and 43-8-164 (1991).

[23]Ill. Ann. Stat. ch. 110½, para. 8-1 and 6-10 (Supp. 1992).

[24]Mo. Ann. Stat. §§ 473.083 and 473.033 (1992).

[25]Nev. Rev. Stat. Ann. §§ 137.080 and 136.100 (1986).

[26]S.D. Codified Laws Ann. § 30-7-2 (1984); S.D. Codified Laws Ann. § 30-6-9 (Supp. 1992).

[27]Wash. Rev. Code §§ 11.24.010 and 11.28.237 (1989).

CONCLUSION

This Court once said "Property does not have rights, People have rights."[28] The Court has continued to affirm that statement in its Due Process decisions. Petitioner seeks protection under the consistent decisions of this Court. However, as indicated, this question is a matter of importance not just to the Petitioner but specifically to citizens of other states and generally the citizens of all states. The Court can only address this question by granting the Writ as

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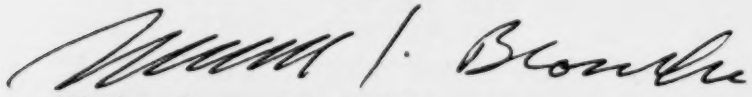
[28] Lynch v. Household Finance Corp., 405 U.S. 538, 555 (1972).

requested and remanding the case to the lower courts.

Respectfully submitted,



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Attorney and Counsel of Record
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AFFIDAVIT OF SERVICE AND MAILING

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Michael J. Blaschke, being first duly sworn deposes and says:

1. That the Petition for Writ of Certiorari To The Supreme Court of the State Of Oklahoma to which this Affidavit is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 29.3 of the Rules of the Supreme Court of the United States by placing three copies of the same in the United States Mail, first class postage prepaid, properly addressed to:

C. D. Northcutt
Northcutt, Clark, Gardner, Hron & Powell
Heartland Federal Building
Suite 401
P. O. Drawer 1669
Ponca City, Oklahoma 74602
(405) 762-1655

2. Because 28 U.S.C. § 2403(b) may be applicable, three copies of the Petition for Writ of Certiorari To The Supreme Court of the State Of Oklahoma have been placed in the United States Mail, first class

postage prepaid, properly addressed to:

Susan Loving
Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

3. That the foregoing represents service on parties required to be served under the provisions of Rule 29 of this Court.

4. That to my own personal knowledge and pursuant to Rule 29.2 of the Rules of this Court, 40 copies of the Petition For Writ of Certiorari To The Supreme Court Of The State Of Oklahoma were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the 6 day of September, 1992, which is within the time allowed for filing under the Rules of this Court.

Michael D. Blaschke

Subscribed and sworn to before me on the 6th day of September, 1992.

Linda K. Cooper
NOTARY PUBLIC

My Commission Expires:

April 10, 1995

APPENDIX I

IN THE DISTRICT COURT
IN AND FOR KAY COUNTY

STATE OF OKLAHOMA

IN THE MATTER OF THE ESTATE OF MARIE ALMA GUMBRECK, Deceased.	)	Case No. P-89-158

JOURNAL ENTRY

This matter came on before the Court upon Motion of the Respondent, Marjorie June Causey, to dismiss the Petition filed by Dr. John A. Blaschke. Oral arguments on the Motion to Dismiss were heard on February 26, 1990. On March 26, 1990, the Court entered its Minute Order (attached as Exhibit "A") dismissing the Petition of Petitioner for the reasons set forth in such Minute Order. Thereafter, a timely-filed Motion for New Trial was filed by Petitioner which was also denied.

Petitioner's Petition is therefore dismissed.

/s/ Neil Beekman
NEIL BEEKMAN, DISTRICT JUDGE

APPROVED:

/s/ Michael J. Blaschke
Michael J. Blaschke, OBA No. 868

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Attorney for Respondent
Marjorie June Causey

DISTRICT COURT MINUTE BOOK
KAY COUNTY, OKLAHOMA

Now on this the 26th day of March, 1990, Court Convenes at the hour of Nine o'clock A.M., pursuant to an order heretofore made on the day of 19 .

Thereupon the Hon. Neal Beekman, District Judge, Judge Carolyn Kahle, Deputy Court Clerk, and Sheriff, were present.

Thereupon the following proceedings were had and done according to law.

P-89-158, In the matter of the Estate of MARIE ALMA GUMBRECK, MINUTE ORDER: Petition of John A. Blaschke is denied. The Court finds that the decedent was a resident of Kay County, Oklahoma and that this Court has venue. The Petitioner knew of the Petition to admit the will to Probate and had time to file a Petition to contest the admission of the will to

Probate within the three month statutory period of time allowed by the statutes of the state of Oklahoma. The will was admitted to Probate on October 16, 1989 and the period of time did not run until January 15, 1990. Petitioner knew on December 15, 1989 and the file does not reflect any filings by Petitioner until February 5, 1990 which was approximately three weeks after the time period had run. Exception is allowed to the Petitioner as to the Court's ruling. Certified copies of the Minute Order are to be mailed to both attorneys.

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

IN THE MATTER OF THE ESTATE OF MARIE ALMA GUMBRECK, DECEASED.	)	
JOHN A. BLASCHKE, Appellant,	)	
vs.	)	No. 75,430
MARJORIE J. CAUSEY, Appellee.	)	NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
KAY COUNTY, OKLAHOMA

Honorable Neal Beekman, Trial Judge

Michael J. Blaschke
Helen Speer Chinn
Mahaffey & Gore, P.C.
Oklahoma City, Oklahoma
For Appellant

C.D. Northcutt
Northcutt, Clark, Gardner,
Hron & Powell
Ponca City, Oklahoma
For Appellee

BRIGHTMIRE, J.

Did the trial court err in dismissing the petition of a disinherited former

legatee contesting the validity of the testatrix's last will, which petition was filed more than ninety days after admission of the last will to probate?

We hold it did not and sustain the order of dismissal.

I

The background facts are these. The decedent, Marie Alma Gumbreck, and her husband, Dr. Lawrence Gumbreck, are said to have executed a will in 1966 (republished by codicil in 1976), naming their friend and family physician, Dr. John A. Blaschke, the sole beneficiary of the Gumbreck estate.[1] Her husband died in the spring of 1988 and his estate was never probated.

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[1]The existence of this last will and testament is unsubstantiated as neither party produced the original nor a copy of the antecedent will as part of the record presented on appeal.

In early January 1989, the decedent moved to Ponca City and sold her home in Oklahoma City in March. There the nearly blind widow lived with some friends named Edward Leroy and Marjorie June Causey.

At the decedent's request her lawyer in Oklahoma City drew up a second will naming the Causeys as the sole beneficiaries of her estate.[2] She went to Oklahoma City and executed this will on January 17, 1989.

Mrs. Gumbreck continued to live in Ponca City until her death on September 1, 1989. The alternate personal

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[2]The 1989 will expressly disinherited the decedent's blood relatives. The will provides: "I have a son, ADRIAN MELIS, who I have not seen or heard from in the past 8 years and I have a half-brother, the son of my father, as well as other relatives, none of whom do I wish to have any of my estate upon my death."

The existence of son Adrian was apparently unbeknownst to Blaschke who claims that "the Gumbrecks who had no children of their own, and who thought of [him] as the son they never had."

representative named in the will, Marjorie Causey, filed a petition in the district court of Kay County, Oklahoma, asking the court to probate the 1989 will. A hearing date was set and notice was mailed to the Causeys and published in the Ponca City News, a newspaper of general circulation.

On October 16, 1989, the trial court without objection, admitted the 1989 will to probate and issued letters testimentary to Causey. Notice to creditors was given and an inventory and appraisement was filed that valued the estate at $181,532.38.

Dr. Blaschke learned of the 1989 will as early as December 15, 1989, and knew of its admission to probate by December 22, 1989, as a result of an investigation made by his attorney. It was not until February 5, 1990, however, that Blaschke

filed a petition contesting the validity of the 1989 will and alleging that he was the sole beneficiary under the 1966 will. His allegations were, among others, that the decedent was incompetent in 1989 and was a victim of undue influence by the Causeys.

The estate moved to dismiss Blaschke's petition on February 28, 1990. The motion was sustained and Blaschke's petition was dismissed March 26, 1990,[3]

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[3]The trial court found:

> "[T}he decedent was a resident of Kay County, Oklahoma and that this Court has venue. The Petitioner knew of the Petition to admit the will to Probate and had time to file a Petition to contest the admission of the will to Probate within the three month statutory period of time allowed by the statutes of the state of Oklahoma. The will was admitted to Probate on October 16, 1989 and the period of time did not run until January 15, 1990. Petitioner knew on December 15, 1989 and the files does not reflect any filings by Petitioner until February 5, 1990 which was approximately three weeks after the time period had run."

and a motion for new trial was overruled April 9, 1990.[4]

Blaschke appealed claiming the dismissal was erroneous because: (1) Personal representative Causey failed to give Blaschke notice of the probate proceedings -- a violation of his Fourteenth Amendment due process rights; (2) the trial court erroneously found venue for the probate to be in Kay County; (3) the trial court erred in failing to find the 1989 will was presumptively

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[4]A motion to dismiss for failure to state a claim upon which relief can be granted under 12 O.S. Supp. 1990 § 2012(B)(6) replaces the code versions of the general demurrer to the pleadings. A petition should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41 (1957); Committee Comment to Section 2012. If matters outside the pleadings are presented to and not excluded by the trial court, the motion to dismiss for failure to state a claim shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by the rules of summary judgment.

invalid on the ground of being executed under duress and undue influence; and (4) Causey is equitably estopped from asserting the time bar of 58 O.S.1981 §§ 61 and 67 by reason of her actions of concealment and extrinstic fraud.

II

The supporting argument for the first point -- failure to give notice -- is that Blaschke was an "interested party" within the meaning of 58 O.S. 1981 § 29 because he had a pecuniary interest in the devolution of the testatrix's estate and therefore a right to contest it.

While Blaschke might well be a § 29 interested party entitled to contest the will, it is undisputed he had actual notice of the probate proceedings in plenty of time to get a petition on file within the three-month limitations period

prescribed by §§ 29 and 61.

Oklahoma probate procedure provides that interested persons may appear and contest a will either before or after its admission to probate within certain time limitations.[5] Such limitations operate upon the rights of the parties and the

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[5]Title 58 O.S. 1981 § 29 provides:

> "Any person interested may appear and contest the will. Devisees, legatees or heirs of an estate may contest the will through their guardians or attorneys appointed by themselves, or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest, after probate, by the party so represented, if commenced within three (3) months from the date the will was admitted to probate; nor does the nonappointment of an attorney by the court of itself invalidate the probate of a will."

Title 58 O.S. 1981 § 61 states in relevant part:

> "When a will has been admitted to probate, any person interested therein may at any time within three (3) months from the date the will was admitted to probate contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a sworn petition in writing containing his allegations, that evidence discovered since the probate of the will, [and] the materials facts." (Emphasis added.)

jurisdiction of the court to hear and determine the issues sought to be raised by the contest. In re Estate of Redwine, 445 P.2d 275 (Okl. 1968). Blaschke is an "person interested" in the decedent's estate, however the timeliness of his contest is still governed by the three-month limitation provisions of § 29 and § 61.

The fact that Blaschke is interested in the decedent's estate does not necessarily entitle him to statutory notice. Those persons who are entitled to personal written notice of the hearing to admit a will to probate are set forth in 58 O.S. 1981 § 25:

> "When the petition for probate of a will is filed . . . and if the names and addresses of all heirs, legatees, and devisees of the testator are known to the petitioner and are set out in said petition, the court shall cause notice of such hearing to be given . . . by mailing

> copies of such notice to all heirs, legatees, and devisees, postage prepaid, at their last known place of residence . . . provided, however, if the name or address of one or more heirs, legatees, and devisees of the testator is not known to the petitioner, notice of the hearing of said petition shall be given by mailing, as above provided, and, in addition thereto, said notice shall be published in one issue of a newspaper." (Emphasis added.)

Blaschke relies on the decision in Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S.Ct. 1340 (1980), as requiring written notice to him by mail of the Kay County probate proceedings. He submits that mailing him notice of the probate would not have unduly burdened the probate process and that he was denied due process a result of Causey's failure to do so. He argues that Causey had knowledge of his "claim" against the decedent's estate and that he would have probably

contested the will if he had received actual notice.

Pope, however, is distinguishable from the case at bar in several respects. In Pope the aggrieved party, i.e., a creditor, was expressly entitled to notice under 58 O.S. Supp. 1990 § 331. The same cannot be said for disinherited heirs, legatees, and devisees under a revoked will.

Moreover, in Pope the Supreme Court recognized the need to assess the propriety of giving actual notice, given the practicalities of the situation, in light of important state interests. Id. at 1346. The high court stated that as a class, creditors may not be aware of the debtor's death or the institution of probate proceedings. The same cannot be said for heirs, legatees, and devisees who

are more often than not family members or friends of the decedent.

Furthermore, giving actual written notice to disinherited beneficiaries is inconsistent with the legislative intent behind fixed periods of limitations for will contests -- facilitating the administration and expeditious closing of estates -- and only encourages litigiousness between actual and previously contemplated beneficiaries. Requiring such notice to persons with no present interest in or claim to the estate would unnecessarily undermine the decedent's right to dispose of his estate as he sees fit.

Courts will pass upon constitutional issues only when it is necessary for a determination on the merits. Schwartz v. Diehl, 568 P.2d 280 (Okl. 1977). On the

basis of Blaschke's own admission, he had actual notice that the 1989 will was admitted to probate as early as December 15, 1989. Therefore as of December 15, Blaschke was put on notice that the estate would be administered in accordance with the terms of the more recently executed will unless he acted to forestall its probate. While he consulted counsel during the three-month time period following the admission of the will to probate, he took no legal action to challenge the will. The notice given according to statute in this proceeding was reasonable and adequate. Accord Matter of Estate of Young, 23 Wash.App. 761, 598 P.2d 7 (1979).

Assuming for the sake of argument that Blaschke was entitled to statutory notice under § 25, as a general rule, one

having actual notice is not prejudiced by, and may not complain of failure to receive statutory notice. First Nat'l Bank v. Oklahoma Sav. & Loan Bd., 569 P.2d 993 (Okl. 1977). On receiving actual notice of the probate of the second will as early as December 15, 1989, it was incumbent upon Blaschke to take the necessary action to preserve his right to challenge the will. Discovery need not be completed in order to do so.

The allegations contained in the affidavit filed by Blaschke's attorney do not fall within the three variations of the adverse party's conduct that would support an equitable estoppel in pais as articulated in Jarvis v. City of Stillwater, 732 P.2d 470 (Okl. 1987). Here there is no evidence of any assurances of settlement, admissions of

liability or false and misleading conduct to induce Blaschke to refrain from timely bringing an action to contest the probated will.

Moreover, there is no evidence of extrinsic fraud perpetrated upon the trial court in obtaining the order admitting the will to probate. Blaschke cites no authority for the proposition that a personal representative has any duty to advise the probate court of previously revoked wills or codicils.

Concerning the venue issue we conclude that there is sufficient evidence in the record to support the trial court's finding that the decedent was a resident of Kay County at the time of her death. 58 O.S. Supp. 1990 § 5(1). That judgment is conclusive unless and until it is vacated in a direct proceeding brought

within the required three-month period. 58 O.S. 1981 § 61. Absent a timely contest the court had proper jurisdiction and venue to hear this probate. It is undisputed that in January 1989, the decedent moved in with the Causeys in Ponca City and in March sold her home in Oklahoma City.

Because of the conclusion we reach with respect to the foregoing issues it is unnecessary to discuss the other issues raised by Blaschke in his petition in error.

IV

The order of the trial court dismissing the petition is therefore sustained.

RAPP, J. concurs, and MEANS, P.J. concurs in result.

December 24, 1991

IN THE SUPREME COURT

OF THE STATE OF OKLAHOMA

Thursday, June 11, 1992

THE CLERK IS DIRECTED TO

ISSUE THE FOLLOWING ORDERS:

70,649 Stephen J. Merrill v. Oklahoma Tax Commission.

Rehearing denied.

CONCUR: Opala, C.J., Hodges, V.C.J., Simms, Hargrave, Wilson, Kauger, Summers, Watt, JJ.

DISSENT: Lavender.

73,837 Hazel Moseley v. Jath Oil Company, Don D. Gates et al.

Certiorari denied.

CONCUR: Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Kauger, Summer, Watt, JJ.

DISSENT: Opala, C.J.

74,437 J.V. Lindley d/b/a J. V. Lindley Enterprises et al. v. James S. McMahon et al.

Certiorari denied.

All Justices concur.

75,007 Larry Hart d/b/a Larry Hart Contracting v. Raymon McVay and Commercial Insurance Agency.

Rehearing denied.

All Justices concur.

75,430 In the Matter of the Estate of Marie Alma Gumbreck, Deceased. John W. Blaschke v. Marjorie J. Causey, Personal Representative of the Estate of Marie Alma Gumbreck.

Certiorari denied.

CONCUR: Hodges, V.C.J., Simms, Hargrave, Wilson, Kauger, JJ.

DISSENT: Opala, C.J., Lavender, Summers, JJ.

75,732 In the Matter of the Estate of Gertrude Jewel Wood, Deceased. Clydine Cornett, Executrix of the Estate of Gertrude Jewel Wood, Deceased et al. v. Marion Jane Bozarth, heir, devisee and legatee of the Estate of Gertrude Jewel Wood, deceased.

Certiorari denied.

All Justices concur.

76,824 Rainbo Bakery and Cigna Insurance Company v. Billy Gene Collins and The Workers' Compensation Court.

Certiorari denied.

All Justices concur.

77,013 Southern Oklahoma Nutrition Program and The State Insurance Fun v. Aiko Marks and The Workers' Compensation Court.

Certiorari denied.

CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Wilson, Watt, JJ.

DISSENT: Simms, Hargrave, Kauger, Summers, JJ.

77,065 Junior C. Thornton v. N. R. Rackliff d/b/a Rackliff Carpentry and The Workers' Compensation Court.

Certiorari denied.

All Justices concur.

77,271 Anchor Glass Container Corporation and Aetna Casualty & Surety Company v. Linda I. Fisher and The Workers' Compensation Court.

Certiorari denied.

CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Kauger, Watt, JJ.

/s/ Marian P. Opala
CHIEF JUSTICE

APPENDIX II

1. U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Okla. Stat. Ann. tit. 58, O.S. § 25 (West Supp. 1992):

> When the petition for probate of a will is filed the court must fix a day for hearing said petition, not less than ten (10) nor more than thirty (30) days from the filing of the petition, and if the names and addresses of all heirs, legatees, and devisees of the testator are known to the petitioner and are set out in said petition, the court shall cause notice of such hearing to be given as provided in Title 58, O.S.S. Annot., Sec. 34; Laws 1969, c. 302, § 38, by mailing copies of such notice to all heirs, legatees,

and devisees, postage prepaid, at their last-known place of residence not less than ten (10) days prior to the date of said hearing; provided, however, if the name or address of one or more heirs, legatees, and devisees of the testator is not known to the petitioner, notice of the hearing of said petition shall be given by mailing, as above provided, and, in addition thereto, said notice shall be published in one issue of a newspaper, and in such case said hearing shall not be less then ten (10) days from the date of publication of such notice.

3. Okla. Stat. Ann. tit. 58, O.S. § 29 (West Supp. 1992):

> Any person interested may appear and contest the will. Devisees, legatees or heirs of an estate may contest the will through their guardians or attorneys appointed by themselves, or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest, after probate, by the party so represented, if commenced within three (3) months from the date the will was admitted to probate; nor does the nonappointment of an attorney by the court of itself

invalidate the probate of a will.

4. Okla. Stat. Ann. tit. 58, O.S. § 61 (West Supp. 1992):

> When a will has been admitted to probate, any person interested therein may at any time within three (3) months from the date the will was admitted to probate contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a sworn petition in writing containing his allegations, that evidence discovered since the probate of the will, the material facts of which must be set forth, shows:

1. That a will of a later date than the one proved by the decedent, revoking or changing the will, has been discovered, and is offered; or

2. That some jurisdictional fact was wanting in the probate; or

3. That the testator was not competent, free from duress, menace, fraud, or undue influence when the will allowed was made; or

4. That the will was not duly executed and attested.

5. Okla. Stat. Ann. tit. 58, O.S. § 67 (West Supp. 1992):

If no person, within three (3) months after the admission

to probate of a will, contests the same or the validity thereof, the probate of the will is conclusive, saving to infants and persons of unsound mind, a period of one (1) year after their respective disabilities are removed.